IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No. 396/2004

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	:	Court's or Judge's orders

CORAM : A.P. Lavande, J.
Dated : October 4, 2006

Heard Mr. A.S. Mardikar, learned counsel for the appellant and Mr. Saboo, learned counsel for respondent nos.1 and 2.

This second appeal has been preferred against judgment and decree dated 1.7.2004 passed by Additional District Judge, Khamgaon in Regular Civil Appeal No.40/2002 allowing the appeal filed by the plaintiffs-respondents against judgment and decree dated 20.7.2002 passed by the Civil Judge, Jr. Dn. Nandura in Regular Civil Suit No.108/1999 dismissing the suit filed by the plaintiff.

The plaintiffs filed the above suit to recover possession of the suit land and for

mesne profits. It is the case of the plaintiffs that the plaintiffs are the owners of the suit land. The plaintiffs have inherited the suit property from their mother Annapurnabai to whom her father Motiram had gifted the suit property by gift deed dated 6.3.1954. It is further the case of the plaintiffs that after the death of Baliram the husband of Annapurnabai got married to Eknath Sultane and the plaintiffs were born out of the said wedlock. The defendant resisted the suit contending that he has been in possession of the suit property by virtue of an agreement made by his father with Annapurnabai the mother of the plaintiffs for cultivation of the suit land. The defendant also contended that there was sale in the year 1967 between Annapurnabai and his father. The trial Court, upon appreciation of the evidence led by the parties, held that the plaintiffs had failed to prove the title to the suit property and the defendant had also failed to prove sale in favour of his father in the

year 1967. The trial Court recorded the finding that the defendant was in possession of the suit land from years 1964 onwards and not from 1954 as contended by the defendant. The appellate Court reversed the finding of the trial Court insofar as the title is concerned and allowed the suit directing delivery of possession of the suit property to the plaintiffs within two months.

Mr. Mardikar, learned counsel appearing for the appellant submitted that the lower appellate Court erred in holding that the plaintiffs had proved their title to the suit property. According to Mr. Mardikar, the plaintiffs had not led any cogent evidence to prove that they were born out of wedlock between Annapurnabai and Eknath Sultane and, therefore, even if the title of Annapurnabai is accepted, the plaintiffs who are sons of Eknath Sultane do not have any title to the suit property. Mr. Mardikar further submitted that the non-production of gift deed in favour of

Annapurnabai is fatal to the case of the plaintiffs. According to learned counsel, finding given by the lower appellate Court while reversing the finding of title to the suit property are perverse warranting interference in second appeal.

Per contra, Mr. Saboo, learned counsel for the respondents-plaintiffs submitted that there is ample and cogent evidence on record to prove the title of the plaintiffs to the suit property. Learned counsel further submitted that the finding given by the trial Court that the plaintiffs have no title to the suit property is absolutely perverse and, therefore, the lower appellate Court is absolutely justified in reversing the said finding. Insofar as the claim by the defendant that the suit property was sold to the father of the defendant in the year 1967 by Annapurnabai in view of the finding given by the trial Court that the defendant had failed to prove the same has become final in the absence of any cross-objection

having been filed before the lower appellate Court by the defendant. He, therefore, submitted that once the title of the plaintiffs is established, the decree for possession ought to follow since the defendant has not been established better title to the suit property having regard to the claim made by the defendant.

I have considered the submissions made by learned counsel for the parties. I have perused the judgments passed by both the Courts below. With the assistance of the learned counsel appearing for the parties, I have also perused the evidence led by the parties. In view of the submissions made by the learned counsel appearing for the parties, it would be necessary to find out if the lower appellate Court is justified in holding that the plaintiffs have proved their title to the suit property. The evidence of Rajaram Sultane – PW 1 establishes that Eknath is his father and Annapurnabai is his mother. This evidence of Rajaram is corroborated by P W 2

Vishwasrao Patil. The oral evidence led by the plaintiffs stands corroborated by documentary evidence to which the lower appellate Court has made reference in paragraph 11 of the impugned judgment. The lower appellate Court referred to the Succession Certificate (Ex.31) which discloses that Annapurnabai expired on 28.10.1996 leaving behind her son Rajaram Eknath Sultane and daughter Tulsabai Zaparde, the plaintiffs in the above suit. In the death certificate, the name of husband of Annapurnabai has been mentioned as Eknath Sultane. The oral evidence of the plaintiffs stands corroborated by documentary evidence. Although gift deed executed in favour of Annapurnabai by her father in the year 1954 has not been produced on record, in my opinion, oral and documentary evidence produced by the plaintiffs clearly establish that they were born out of wedlock of Annapurnabai and Eknath Sultane. Consequently, the title of the plaintiffs to

the suit property is proved. In my opinion, failure on the part of the plaintiffs to produce gift deed in favour of Annapurnabai is not fatal. In view of this position, in my opinion, the finding given by the lower appellate Court that the plaintiffs had proved their title to the suit property cannot be faulted, and since the defendant has not proved any title to the suit property, decree passed by the lower appellate Court cannot be faulted.

For the reasons aforesaid, I do not find any merit in the present appeal. No substantial question of law is involved in the appeal. Therefore, the appeal is summarily rejected.

C.A. No. 5722/2004

In view of dismissal of second appeal, nothing survives in the civil application. Hence, the civil application is dismissed as infructuous.

JUDGE

A.